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No. 10-720

Supreme Court, U.S
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In the Supreme Court of the United States

DAVID GEISEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly instructed the jury on a deliberate-ignorance theory of knowledge based on evidence that petitioner knew there was a high probability that information he submitted to the Nuclear Regulatory Commission contained false statements or concealed material facts.

2. Whether the district court erred in finding that any error in giving a deliberate-ignorance instruction would have been harmless because there was sufficient evidence to establish that petitioner had actual knowledge of falsehoods and material concealment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 612 F.3d 447. The opinion of the district court denying petitioner's motion for judgment of acquittal or new trial (Pet. App. 61a-64a) is unreported

JURISDICTION

The judgment of the court of appeals was entered on July 15, 2010, and a petition for rehearing was denied on September 2, 2010 (Pet. App. 139a-140a). The petition for a writ of certiorari was filed on December 1, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was

convicted on three counts of knowingly and willfully concealing material information and making false statements to the Nuclear Regulatory Commission (NRC), in violation of 18 U.S.C. 1001 and 2. Pet. App. 2a. The district court sentenced petitioner to probation and imposed a fine of $7500. *Id.* at 144a-149a. The court of appeals affirmed. *Id.* at 1a-60a.

1. NRC regulates nuclear power plants pursuant to the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.* All plants must be licensed by NRC and must operate in accordance with license conditions. 42 U.S.C. 2131; 10 C.F.R. 50.10(b); see also 42 U.S.C. 2133 (commercial licenses). The regulations implementing the Atomic Energy Act require all licensees to "submit * * * written statements, signed under oath or affirmation," whenever NRC requests information to determine whether a license should be modified, suspended, or revoked. 10 C.F.R. 50.54(f). In addition, all "[i]nformation provided to the Commission * * * by a licensee * * * shall be complete and accurate in all material respects." 10 C.F.R. 50.9(a).

2. This case arises out of events that occurred in 2001 and 2002 at the Davis-Besse Nuclear Power Station (Davis-Besse) near Toledo, Ohio. Pet. App. 3a. In response to a safety incident at a similar plant, NRC required inspections at all plants by the end of 2001. *Ibid.* The operator of the Davis-Besse plant successfully petitioned NRC to postpone such an inspection until a planned refueling shutdown in the Spring of 2002. *Ibid.* When the inspection did take place, Davis-Besse found five cracked nozzles and a significant cavity caused by erosion in the head of the nuclear reactor. *Ibid.* Petitioner and two other employees at the plant were indicted for providing false statements and concealing

material facts in connection with the plant's successful petition to postpone inspection. *Ibid.*

a. Davis-Besse is a two-loop pressurized water reactor. Pet. App. 4a; C.A. App. 813, 839. Uranium-235 rods at the core of the reactor vessel fuel a nuclear reaction that heats "coolant water" in a "primary loop," which transfers heat to a "secondary" water-to-steam loop that drives turbines to generate electricity. Pet. App. 4a; Tr. 521-531; C.A. App. 812. The coolant is conditioned with boric acid to regulate the nuclear reaction and is pressurized to approximately 2000 pounds per square inch. *Ibid.* At the top of the reactor vessel is a domed carbon-steel lid or "head" that is approximately ten feet in diameter and six inches thick. C.A. App. 839, 841. Sixty-nine nozzles (tubes four inches in diameter and several feet long) penetrate the head. Pet. App. 4a; C.A. App. 839, 841. The nozzles and drive mechanisms above the reactor head enable operators to lower control rods into the reactor vessel to control the nuclear reaction. Pet. App. 4a; Tr. 527-529.

b. In the early 1990s, the nuclear power industry discovered that the vessel-head nozzles on pressurized water reactors are susceptible to "stress corrosion cracking." Tr. 111-112; Pet. App. 8a. When such stress corrosion cracking occurred, it initially appeared as small axial cracks that were not considered an imminent safety threat. Tr. 111-113, 536, 540-541; Pet. App. 8a. The NRC believed that the cracks would be identified by substantial visible evidence of leakage before they would pose a threat to the structural integrity of a reactor. Tr. 536; Pet. App. 8a-9a. When pressurized coolant escapes from a reactor or contacts the extremely hot vessel head within the reactor, the coolant water tends to flash to

steam, leaving behind telltale boric-acid deposits and limiting any corrosion. Tr. 239, 536; Pet. App. 9a.

In early 2001, however, operators of the Oconee Nuclear Station in South Carolina discovered circumferential cracking on several nozzles, including a large through-wall crack that extended 165 degrees around one nozzle, above the nozzle's underside weld and within the vessel head's "pressure boundary." Tr. 242-247; C.A. App. 246-248; Pet. App. 8a-10a. A nozzle thus weakened is at risk of being "physically blow[n]" out of the reactor head, Tr. 114-115, which would produce a sudden rupture of the pressure boundary and rapid release of coolant, Tr. 289-292. See C.A. App. 251; Pet. App. 8a-10a. Such a "loss of coolant accident" would threaten damage to the core of the reactor. Tr. 291-293. Further, Oconee operators observed only a small "popcorn" like boric acid deposit—less than one cubic inch in size—at the surface where the affected nozzle penetrated the vessel head. C.A. App. 247, 251; Tr. 242. Those observations belied expectations that significant leaks and large deposits on the topside of the vessel head would precede any serious cracking underneath. C.A. App. 251.

In response to this newly discovered risk, NRC issued a bulletin alert on August 3, 2001 (NRC Bulletin 2001-01), requiring affected plant licensees to provide detailed information about susceptibility to cracking and previous inspections, including a "description of * * * nozzle and * * * head inspections * * * performed * * * in the past 4 years," and "a description of any limitations (insulation or other impediments) to accessibility of the bare metal of the * * * head for visual examinations." C.A. App. 246-261; Pet. App. 10a-11a. The Bulletin advised that plants (including Davis-Besse)

with a "high susceptibility" to stress cracking "need[ed] to use a qualified visual examination of 100% of the * * * nozzles" and that "the effectiveness of [such] examination should not be compromised by the presence of insulation, existing deposits on the [reactor vessel] head, or other factors that could interfere with the detection of leakage." C.A. App. 253. The Bulletin further directed that any licensee that did not intend to shut down for inspection before December 31, 2001, must submit a "basis for concluding" that its plant could safely operate in accordance with regulatory requirements prohibiting "cracked and leaking * * * nozzles" until the next scheduled outage. *Id.* at 254-256.

Davis-Besse, like all pressurized water reactors, was subject to the requirements in the NRC Bulletin. C.A. App. 388; Pet. App. 10a-11a. Davis-Besse sought permission to maintain operations until the next scheduled shut-down in April 2002 rather than shutting down for a complete inspection by the end of 2001. Pet. App. 10a. Davis-Besse was required to provide information demonstrating that it could continue to operate safely, including descriptions of nozzle and vessel head inspections that had been performed, any conclusions resulting therefrom, and a description of any limitations to accessibility of the vessel head. *Id.* at 11a. Regulations governing the nuclear industry required that Davis-Besse respond to the NRC Bulletin with "written statements, signed under oath or affirmation," and that all information provided to NRC "be complete and accurate in all material respects." *Id.* at 11a-12a (citing 10 C.F.R. 50.54(f), 50.9(a); 42 U.S.C. 2011 *et seq.*). Between September 4 and November 30, 2001, Davis-Besse operators submitted a series of letters to NRC containing the information requested in the Bulletin. Several conference

calls and meetings also took place between Davis-Besse employees and NRC between September 4 and December 4, 2001. This case concerns false statements and material omissions made in those letters and meetings.

3. a. At the time of the NRC Bulletin, Davis-Besse operators lacked critical information about the condition of the plant's nozzles for two reasons. First, due to plant design, physical access to the surface of the vessel head and nozzle penetrations was severely restricted. Tr. 837. At all times relevant to this case, the only access to the surface of the vessel head was through 18 approximately five-by-seven inch rectangular "weep holes" at the bottom of the service structure. Tr. 543, 927. In order to visibly inspect the vessel head and nozzle penetrations, therefore, Davis-Besse personnel had to insert pole-mounted video cameras through the weep holes. Tr. 881. Given the small size of the weep holes, the length of the poles, the curvature of the head, the distance to the top of the head, and the limited space between the insulation and the top of the head, a substantial portion of the head was inaccessible for inspection or cleaning. Tr. 612, 928-29, 944-45, 1179-1180; C.A. App. 201, 823.

Second, during biannual refueling outages in 1996, 1998, and 2000, Davis-Besse personnel observed increasing boric acid deposits on the vessel head. Davis-Besse operators attributed those deposits to leaks from faulty gaskets on "control rod drive mechanism" (CRDM) flanges above the insulation, rather than to cracked nozzles. C.A. App. 614, 618; Tr. 1202-1203. Whatever their source, the deposits blanketed substantial areas of the vessel head, preventing inspection for popcorn-like deposits at nozzle penetrations such as those that had been observed at the Oconee plant in South Carolina. Tr. 248.

Significantly, during the 2000 refueling outage, Davis-Besse personnel encountered rust-stained boric acid formations that flowed like lava from several weep holes, completely blocking access for inspection through those holes. C.A. App. 632, 817; Tr. 179-180. During cleaning efforts, the plant was forced to use pressurized hot water to loosen deposits and "spud" bars to break up chunks that could not fit through the weep holes. Tr. 175-178.

At trial, the government introduced Davis-Besse's inspection videos from 1996, 1998, and 2000, as well as a report on their content. Tr. 517, 542-553, 658-659. Of the 69 nozzles on the reactor head, the 1996 video showed only 51, the 1998 video showed only 43, and the 2000 video showed only 23. Tr. 551; C.A. App. 803-810. Due to incomplete camera views and boric acid deposits masking nozzle penetrations, the total number of nozzles that could be verified to be free of popcorn-like deposits from the video evidence was only 28 in 1996, 18 in 1998, and five in 2000. Tr. 551-552; C.A. App. 803-810.

b. In 1998, petitioner began working at Davis-Besse. Tr. 1820. In 1996, he became a senior reactor operator. Tr. 1821. In March 2000, he became the Design Basis Engineering Manager, with responsibility over issues relating to reactor design. Tr. 1823-1826. Petitioner supervised the 2000 refueling outage and observed photos of boric acid flowing from service-structure weep holes. Tr. 1831-1832. On April 27, 2000, petitioner reviewed a "condition report" describing the "lava-like" flows of boric acid encountered during the 2000 refueling outage, and authorized removal of the restraint on returning to operation that had been prompted by that report. C.A. App. 636, 831. In September 2000, petitioner participated in a management decision to defer

action, for financial reasons, on a plan to cut access doors into the service structure to correct the design flaw that prevented access to the vessel head and nozzles for inspection and cleaning. Tr. 930-969, 1953-1955; C.A. App. 639, 644, 823.

Shortly thereafter, petitioner learned of the Oconee findings. Tr. 1501, 1504, 1836-1837. On June 27, 2001, petitioner executed a decision memo addressing those findings and concluding that vessel head and nozzle inspection at Davis-Besse could be "deferred" until the next refueling outage, scheduled for April 2002. C.A. App. 232-239. The memo observed that "[l]arge boron leakage from a CRDM flange" had prevented "detailed inspection of" the nozzles during the previous outage, *id.* at 233, 237, but concluded that delaying inspection until April 2002 did not carry a risk of "catastrophic failure" because Davis-Besse's nozzles were 2.5 operational years behind Oconee's in terms of use and expected degradation, *id.* at 234, 238. Approximately one month later, the NRC issued its Bulletin emphasizing the "need" for a "a qualified visual examination of 100% of the * * * nozzles." *Id.* at 253.

c. Petitioner and a team of others prepared and reviewed Davis-Besse's response to the NRC Bulletin, which was submitted on September 4, 2001. C.A. App. 383-410. At trial, petitioner testified that he did not draft the document, but went through the "pertinent sections that deal with the design of the plant" to "make sure that they sounded right." Tr. 1861, 1905. On the question of design impediments to inspection, the letter falsely stated that the insulation structure "does not impede a qualified visual inspection" and "does not interfere with the visual inspection." C.A. App. 389. As to recent inspections, the letter reported only "some accu-

mulation of boric acid deposits * * * beneath * * * leaking flanges," and did not disclose the "large boron leakage" and "lava-like" flows encountered the previous year. *Id.* at 389-390. The letter concluded that Davis-Besse need not shut down for inspection before its next scheduled refueling outage because: (1) Davis-Besse was "similar in design" to Oconee, (2) Oconee had "demonstrated an ability to identify leaking CRDM nozzles by visual inspection," and (3) Davis-Besse's 1998 and 2000 video inspections revealed no "indications * * * similar to [those] seen at [Oconee]." *Id.* at 390, 392-394.

d. Upon review, the NRC found this response to be incomplete and confusing, especially as to the extent of prior inspections. Tr. 122, 233-234. On September 28, 2001, the NRC advised Davis-Besse that the plant would face a shutdown order in December if the plant was unable to provide a "better justification" for continuing to operate. Tr. 123. Because a shutdown before completion of the fuel cycle would have had a negative impact on operational costs and employee morale, Davis-Besse managers scrambled to avoid it. Tr. 1222-1225, 1515.

During an October 3, 2001, conference call with NRC staff, petitioner provided Davis-Besse's initial answer on the actual number of nozzles previously inspected, falsely asserting that the inspections covered "100 percent" of the head, with only four or five nozzles impeded by boric acid deposits from flange leaks. Tr. 246-247, 393-395, 1227-1229; C.A. App. 656. Sometime thereafter, petitioner directed co-defendant and reactor coolant systems engineer Andrew Siemaszko, to prepare a table reporting nozzle-by-nozzle inspection results. Tr. 1515-1516. Petitioner told NRC investigators that he viewed inspection video images at Siemaszko's desk and was responsible for Siemaszko's work. Tr. 1516-1517,

1522-1523. Petitioner also told a company investigator that he reviewed inspection videos "while preparing for the NRC interactions in August, 2001." C.A. App. 831; Tr. 482, 505-507. On October 11, 2001, petitioner and other Davis-Besse managers traveled to NRC headquarters in Rockville, Maryland, to brief NRC staff. Tr. 249-251; C.A. App. 660-681. Petitioner prepared and presented an exhibit that falsely reported that Davis-Besse had "verified" all nozzle penetrations "to be free from 'popcorn' type boron deposits using video recordings from" 1998 and 2000. Tr. 1236, 1916; C.A. App. 667, 678.

On October 17, 2001, petitioner and others approved a supplemental response to the Bulletin containing Siemaszko's table reporting nozzle-by-nozzle inspection results. C.A. App. 414-425. In contrast to the October 11 briefing, the October 17 letter reported that Davis-Besse had not viewed all nozzles in 1998 and 2000, because some nozzles were "obscured by boric acid crystal deposits." *Id.* at 421. The letter falsely added, however, that the "the entire [vessel] head was inspected" in 1996, that the 1996 inspection included "65 of 69 nozzles,"—*i.e.*, all nozzles that Davis-Besse believed to qualify for visual inspection—and that the inspections revealed no indications of leaking nozzles. *Id.* at 420-421, 425. With respect to the 1996 inspection, the table contained no nozzle-specific results, but instead contained a footnote stating that the "entire" head was viewed, but that "specific nozzle view[s]" could not be correlated by nozzle number, because the video was "void of head orientation narration." *Id.* at 424-425. At trial, the government played portions of the 1996 video, which did include audio head-orientation narration—narration NRC used to

correlate nozzle views and determine that all nozzles were not depicted. Tr. 658-659.

Based on the false report of a whole-head inspection in 1996, the letter postulated that the "earliest" a crack could have begun to develop was May 1996, after the inspection. Tr. 658-659. Citing analysis indicating that it would take at least 7.5 years for a through-wall circumferential crack to grow beyond an "allowable" size, the letter concluded that Davis-Besse could safely operate through at least 2003, precluding the need for an inspection before the refueling outage scheduled for April 2002. C.A. App. 421-422. In a follow-up meeting with the NRC on October 24, 2001, petitioner again falsely reported that "the inspection results afford us assurance that all but 4 nozzle penetrations were inspected in 1996" and that "no head penetration leakage was identified." *Id.* at 682-707; Tr. 1247-1250.

Petitioner subsequently reviewed and approved three additional supplemental responses, each reiterating the false reports on the scope and quality of the video inspections. C.A. App. 527-611, 708-710, 712-729. One submission was designed to provide representative images from the three video inspections, *id.* at 559-608, but excluded the most damaging images, as well as the 2000 photos showing rust-colored lava-like flows emanating from the weep holes, Tr. 276-284. Petitioner testified that he created the photo captions for the report. Tr. 1519-1521. A caption depicting boric-acid deposits in 1996 describes the deposits as being "in the vicinity of previous leaking flanges" and "verified to not be active or wet." C.A. App. 570. Petitioner attributed this information to an employee who had inspected the flanges above the mirror insulation, not the reactor head below. Tr. 1428-1442, 1519, 1521. The employee who performed

the 1996 vessel head inspection testified that the inspection was incomplete and that he had told others so. Tr. 1092. Both employees testified that nobody at Davis-Besse asked them about the images or photo captions submitted to NRC. Tr. 1157, 1445.

On the evening of November 8, 2001—in advance of another NRC meeting—petitioner met with NRC staff to show parts of the inspection videos. Tr. 281-282, 300-304, 332. Petitioner played portions of the 1996 and 1998 videos. Tr. 303-304. An NRC investigator testified that he learned "in retrospect," after viewing the videos as part of the NRC investigation, that petitioner had shown only the "good portions." Tr. 281.

e. NRC agreed on December 4, 2001, not to issue a shut-down order to Davis-Besse, based in part on Davis-Besse's submissions regarding its previous inspections and on its agreement to shut down for refueling in February 2002. C.A. App. 875. When Davis-Besse did later shut down for refueling, the plant discovered five cracked nozzles. *Id.* at 840-841. During efforts to repair the cracks, one of the nozzles unexpectedly tilted over, revealing a large corrosion cavity, approximately seven inches long, five inches wide, and six and a half inches deep. *Id.* at 814, 840-841; Tr. 740. Within this area, the carbon steel had completely degraded—constituting a "loss of the design basis structural/pressure retaining boundary"—leaving only the thin layer of cladding, which had "deflected upward" into the cavity. C.A. App. 841.

4. In January 2006, a grand jury indicted petitioner and two other Davis-Besse employees on five counts of knowingly and willfully concealing material information and making false statements to the NRC, in violation of 18 U.S.C. 1001 and 2. Pet. App. 2a, 22a. At trial, peti-

tioner acknowledged conveying false information to NRC, Tr. 1986, 1995-1996, 2000, but denied doing so knowingly and with an intent to deceive. Tr. 1817-1818, 1843. Among other things, petitioner acknowledged erroneously assuring NRC staff at the October 11, 2001, meeting that the 1998 and 2000 inspections combined covered all nozzles. Tr. 1917-1918, 1989-1990. Petitioner testified that this assurance was based on Siemaszko's review of the video inspections and that he knew Siemaszko's work was not complete when the assurance was made. *Ibid.* Petitioner also testified that Siemaszko's review was the source of petitioner's subsequent false assurances that the 1996 inspection included the entire head. Tr. 1992. Yet petitioner denied that he ever "actually spoke face-to-face [with Siemaszko] regarding that." *Ibid.* Petitioner testified that he "stopped by" Siemaszko's cubicle only once when Siemaszko was reviewing still images, to learn how Siemaszko was attributing boric acid deposits to flange leaks rather than to cracked nozzles (an issue distinct from the completeness of the video inspections), and claimed that he did not view the videos until he showed them to NRC. *Id.* at 1912-1915. This contradicted petitioner's statement to the company investigator that he had reviewed the videos "while preparing for the NRC interactions." C.A. App. 831.

At the request of the government, the district court gave the jury a "deliberate ignorance" instruction based on Sixth Circuit Pattern Jury Instruction 2.09. Pet. App. 26a. The court advised the jury that:

> No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that [petitioner] deliberately ignored a high probability that the submissions and presentations to the

> NRC concealed material facts or included false statements, then you may find that he knew that the submissions and presentations to the NRC concealed material facts or included false statements. * * * But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts or included false statements and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide.

Tr. 2338-2339. The jury convicted petitioner on three counts of violating 18 U.S.C. 1001 and 2. Pet. App. 26a, 142a-143a. Petitioner filed a motion for a judgment of acquittal and for a new trial, arguing that the evidence was insufficient to warrant the deliberate-ignorance instruction. See *id.* at 62a-63a. The district court denied the motion, reasoning that the decision to give the instruction, if error, was harmless given the sufficiency of the evidence proving petitioner's actual knowledge. *Id.* at 63a-64a.

5. The court of appeals affirmed. Pet. App. 1a-60a. The court concluded that the district court "properly instructed the jury" that it could find that petitioner had the requisite knowledge under a deliberate-ignorance theory because the instruction was a correct statement of the law and because the court gave a limiting instruction that "foreclose[d] the possibility" that the conviction was "improperly based on negligence or carelessness." *Id.* at 28a-29a (brackets in original) (citation omitted). The court also concluded that the government had presented ample evidence to support a conviction based on

either actual knowledge or on a conclusion that petitioner acted with deliberate ignorance. *Id.* at 30a-33a. In addition, the court determined that, even if it had been error for the district court to give a deliberate-ignorance instruction, any error was harmless because the court's instructions correctly stated the law and because the evidence was sufficient to prove "actual" knowledge. *Id.* at 29a-30a (citing *Griffin* v. *United States*, 502 U.S. 46, 55-56 (1991) and *United States* v. *Mari*, 47 F.3d 782, 785-787 (6th Cir. 1995)).

ARGUMENT

1. Petitioner contends (Pet. 16-19) that the government presented insufficient evidence to justify the district court's giving a deliberate-ignorance instruction to the jury. He asks (Pet. 17) this Court to "[r]estrict[] the deliberate ignorance instruction to cases in which there is evidence that the defendant took affirmative steps to avoid gaining knowledge based on a motive to escape conviction." That argument does not warrant further review because it is incorrect and because it does not implicate any disagreement among the courts of appeals.

a. Petitioner does not appear to argue that jury instructions on deliberate ignorance must require the jury to find that the defendant avoided learning the truth because of a motive to avoid criminal liability.[1] The

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[1] Petitioner has waived such an argument in any case by failing to raise it in the district court or court of appeals. See Eugene Gressman et al., *Supreme Court Practice* § 6.26(b), at 465 (9th ed. 2007) (noting that this Court "generally declines to review issues not pressed or passed upon by the lower courts") (emphasis omitted); see also *United States* v. *Williams*, 504 U.S. 36, 41 (1992). Petitioner did argue in the court of appeals that the court's pattern jury instruction on deliberate ignorance should not be given unless the evidence supports an inference that a defendant remained deliberately ignorant because he was moti-

courts of appeals generally agree that a deliberate-ignorance instruction need not include a requirement that the defendant's motive was to create a defense to criminal conviction. See, *e.g.*, *United States* v. *Singh*, 222 F.3d 6, 11 (1st Cir. 2000) (upholding deliberate-ignorance instruction similar to model instruction given in this case); *United States* v. *Nektalov*, 461 F.3d 309, 313-314 (2d Cir. 2006) (same); *United States* v. *Wert-Ruiz*, 228 F.3d 250, 255 (3d Cir. 2000); *United States* v. *Campbell*, 977 F.2d 854 (4th Cir. 1992), cert. denied, 507 U.S. 938 (1993); *United States* v. *Newell*, 315 F.3d 510, 528 (5th Cir. 2002); *United States* v. *Beaty*, 245 F.3d 617, 622 (6th Cir.), cert. denied, 534 U.S. 895 (2001); *United States* v. *Hauert*, 40 F.3d 197, 203 (7th Cir. 1994), cert. denied, 514 U.S. 1095 (1995); *United States* v. *Heredia*, 483 F.3d 913, 919-920 (9th Cir.) (en banc), cert. denied, 552 U.S. 1077 (2007).

Petitioner asserts instead that three courts of appeals "have squarely held that" evidence of a defendant's "motive to escape prosecution" is an "indispensable foundation for the giving" of a deliberate-ignorance instruction. Pet. 16 (citing *United States* v. *Puche*, 350 F.3d 1137, 1149 (11th Cir. 2003); *United States* v. *Willis*, 277 F.3d 1026, 1032 (8th Cir. 2002); *United States* v. *Delreal-Ordones*, 213 F.3d 1263, 1268-1269 (10th Cir. 2000)). That is incorrect. It is true that the three decisions petitioner cites observe that a deliberate-ignorance instruction is proper "when the Government presents evidence that the defendant purposely contrived to avoid learning all of the facts in order to have

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vated by a desire to escape criminal conviction. Pet. C.A. Br 48. But petitioner neither asked the district court to instruct the jury on motive nor argued in the court of appeals that the district court's failure to do so was error

a defense in the event of prosecution." *Delreal-Ordones*, 213 F.3d at 1268 (internal citation omitted); accord *Puche*, 350 F.3d at 1149; *Willis*, 277 F.3d at 1032. But all of those cases upheld the district court's decision to instruct the jury on deliberate ignorance without inquiring whether the government had presented any direct evidence of the defendant's motive in remaining ignorant. Instead, the courts found sufficient evidence to justify the instruction in each case because the government had established that the defendant "purposely" or "deliberately" avoided acquiring information that would have supplied knowledge of the fact at issue. See *Puche*, 350 F.3d at 1149; *Willis*, 277 F.3d at 1032; *Delreal-Ordones*, 213 F.3d at 1268-1269.

b. The same is true in petitioner's case. Petitioner argues (Pet. 18-19) that there was insufficient evidence to support the deliberate-ignorance instruction because petitioner might have had "innocent reasons" for remaining ignorant about the falsity of the information he conveyed to NRC. But so long as the record contained sufficient evidence from which a rational jury could infer that the defendant was aware of a high probability that the submissions to the government were false and that he deliberately closed his eyes to that fact, the possibility that he might have had "innocent reasons" for his actions does not preclude the giving of a deliberate-ignorance instruction. Deliberate ignorance satisfies the knowledge element of the offense regardless of the defendant's asserted reason for remaining deliberately in the dark about lies to the government. The statute does not require that a defendant's intent to deceive have been motivated by an intent to avoid conviction. A defendant's intentional decision to remain ignorant of relevant facts because he wishes to effect a particular regulatory

outcome is no less "knowing and willful," and therefore no less a violation of Section 1001.

Not every failure to investigate a suspicion about a representation that turns out to be false will constitute a "knowing and willful" deception. But that issue is for the jury to resolve. Here, the district court properly instructed the jury that, in order to prove that petitioner acted "knowingly and willfully," 18 U.S.C. 1001, when he made false statements to and concealed material facts from NRC, the government needed to prove beyond a reasonable doubt that petitioner acted "with the intent to deceive." Tr. 2334. The court further instructed the jury that "good faith" constituted a complete defense, and that petitioner could not be convicted on "an opinion honestly held." Tr. 2337. That instruction, taken together with the court's instructions on knowledge and deliberate ignorance, was sufficient to ensure that the jury did not convict petitioner based on a finding that petitioner "innocent[ly]" remained ignorant of the operative facts.

Establishing proof of deliberate ignorance through proof of "an awareness of a high probability" establishes more than proof of "merely a reckless disregard, or a suspicion followed by a failure to make further inquiry." *United States* v. *Jewell*, 532 F.2d 697, 707 (9th Cir. 1976) (en banc) (Kennedy, J., dissenting). Rather, it "establishes knowledge as a matter of subjective belief." *Ibid.* Moreover, the instruction here specifically advised that the jury could not find knowledge based on mere "[c]arelessness, or negligence, or foolishness." Tr. 2339. The evidence before the jury was more than sufficient to establish that petitioner had the mental state necessary to violate Section 1001.

c. In any event, contrary to petitioner's claim (Pet. 18-19), the government introduced sufficient evidence to prove that petitioner did act with "deliberate ignorance" out of a "desire to escape conviction." Accordingly, he would not prevail even under his own test. Petitioner is incorrect in asserting (*ibid.*) that he was convicted for "failing to fully assimilate historical information about prior plant cleanings." He was convicted for making false assurances to NRC about the completeness of vessel-head inspections without a credible basis for such statements—and at the very least with the subjective awareness of the high probability that the assurances were not true (if not positive knowledge that the assurances were false). As detailed at pp. 6-12, *supra*, petitioner repeatedly assured NRC that Davis-Besse could and did inspect all nozzle penetrations on the vessel head. Petitioner testified that he relied on the report Siemaszko prepared based on a review of previous inspection videos. Petitioner testified that he assured NRC that 100 percent of the plant's nozzles had been visually inspected without discussing the matter with Siemaszko, reviewing the video himself, reviewing the inspection report, or questioning the employee who performed the inspection. Tr. 1908-1909, 1917-1918, 1923-1924, 1991-1992.

Moreover, petitioner reported to NRC that 100 percent of the nozzles had been inspected in spite of his strong reason to suspect that no previous video inspection could have been complete. The trial evidence demonstrated that Davis-Besse's access to the vessel head was severely restricted. Tr. 837. The plant's "project review group" had previously recommended a design modification to install inspection openings in the service structure in order to remedy the fact that the plant of-

fered "less that 50% accessibility to the reactor vessel head." C.A. App. 823. Petitioner was aware of the recommended modification and had direct responsibility for design issues. Tr. 1823-1824, 1953. Petitioner was also aware that the previous inspections had been impeded by boric acid deposits presumed to be from leaking flanges. C.A. App. 233, 237. And petitioner knew that all previous inspections had been conducted before the Oconee findings and thus before the industry (and Davis-Besse operators) was on notice of the need for close inspection of all nozzle penetrations. Tr. 1837-1838; C.A. App. 246-254. Finally, petitioner made false assurances that Davis-Besse was able to inspect the entire vessel head before he had even assigned Siemaszko the task of reporting nozzle-specific results, Tr. 246-247, 393-395, 1227-1229, and before Siemaszko had completed the table, Tr. 1916-1918; C.A. App. 667, 678.

Thus, the jury had ample evidence from which to infer not only that petitioner was aware of the high probability that his representations were false, but also that he avoided asking questions that would have revealed such falsity in order to retain the ability to deny culpability in the event NRC discovered the truth.

2. Petitioner also urges (Pet. 19-22) that the court of appeals applied an incorrect standard for determining whether a deliberate-ignorance instruction that lacks an adequate evidentiary basis constitutes harmless error; he argues that review is warranted to resolve a conflict in the circuits on this issue. This Court previously has denied review of cases involving the identical circuit conflict alleged here. See *Hernandez-Mendoza* v. *United States*, No. 10-6879, 2011 WL 677072 (U.S. Feb. 28, 2011); *Kennard* v. *United States*, 551 U.S. 1148 (2007) (No. 06-10149); *Ebert* v. *United States*, 534 U.S. 832

(2001) (No. 00-9596); *Ebert* v. *United States*, 529 U.S. 1005 (2000) (No. 99-6789). There is no reason for a different result in this case. In any event, the court of appeals' decision is correct, and the purported conflict (if it still exists) does not presently require this Court's attention. Moreover, this case is an unsuitable vehicle for addressing the question petitioner presents.

a. As discussed *supra*, the court of appeals found that there was sufficient evidence to support the district court's giving a deliberate-ignorance instruction in this case. Pet. App. 31a-33a. The court of appeals also held in the alternative that, even if there had not been sufficient evidence to support the instruction, any error in giving the instruction would have been harmless because there was sufficient evidence to support petitioner's convictions on an actual-knowledge theory. *Id.* at 30a. That alternative conclusion was correct.

The instruction on deliberate ignorance in part informed the jury that it could convict petitioner based on a deliberate-ignorance theory if it was "convinced beyond a reasonable doubt that the defendant was aware of a high probability that the submissions and presentations to the NRC concealed material facts * * * or included false statements and that the defendant deliberately closed his eyes to what was obvious." Tr. 2338-2339. "[T]he 'crucial assumption' underlying the system of trial by jury 'is that juries will follow the instructions given them by the trial judge.'" *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983) (quoting *Parker* v. *Randolph*, 442 U.S. 62, 73 (1979)); see *Zafiro* v. *United States*, 506 U.S. 534, 540-541 (1993); *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). A jury following the district court's instruction (as a reviewing court must assume it did) and finding no evidence of deliberate ig-

norance could not have convicted petitioner by finding he was deliberately ignorant. See, *e.g.*, *United States* v. *Stone*, 9 F.3d 934, 938 (11th Cir. 1993), cert. denied, 513 U.S. 833 (1994). Accordingly, if the deliberate-ignorance instruction was not warranted on the facts, then giving the instruction was harmless because a properly instructed jury would have rejected it and instead relied on an alternative theory supported by the evidence.

That is precisely the logic of this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), on which the court of appeals correctly relied. Pet. App. 30a & n.3. In *Griffin*, the Court rejected the defendant's claim that a general verdict must be set aside where "one of the possible bases of conviction was neither unconstitutional * * * nor even illegal * * * but merely unsupported by sufficient evidence." 502 U.S. at 56. As the Court explained, it is " settled law * * * that a general jury verdict [i]s valid so long as it [i]s legally supportable on one of the submitted grounds—even though that g[i]ve[s] no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury's action." *Id.* at 49. The Court distinguished between a jury instruction that misstates the law and one that merely presents one theory of conviction (out of several) that is not supported by the evidence. The Court explained:

> When * * * jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Id. at 59 (emphasis omitted); see *Sochor* v. *Florida*, 504 U.S. 527, 538 (1992) ("We reasoned [in *Griffin*] that although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence.").

Here, petitioner does not claim that any of the jury instructions—on actual knowledge or deliberate ignorance—was legally faulty. Rather, petitioner claims that the deliberate-ignorance theory was unsupported by the evidence offered at trial. But under *Griffin*, the submission to the jury of the deliberate-ignorance theory—even if the evidence at trial had been insufficient to support that theory—would not warrant reversal. See *Stone*, 9 F.3d at 937-942; see also *United States* v. *Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994).

Petitioner's reliance (*e.g.*, Pet. 18, 21-22) on cases like *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), and *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam), is misplaced. Those cases, unlike this case, involved jury instructions that were legally erroneous because they omitted or misdescribed an element of the offense. See *Skilling*, 130 S. Ct. at 2934; *Hedgpeth*, 129 S. Ct. at 530-531. When a jury returns a general guilty verdict after being instructed on one legally sound theory of guilt and one legally unsound theory, a reviewing court ordinarily cannot have confidence that the verdict rests on the legally sound theory, and thus the verdict may stand only if the reviewing court determines that any error was harmless on the particular facts of the case. By contrast, this case does not involve a legally erroneous jury instruction. As the court of appeals correctly recognized, *Griffin* supplies the appropriate framework for review. Pet. App. 30a (citing Sixth Circuit's decision in *United States* v. *Mari*, 47 F.3d 782, cert. denied, 515

U.S. 1166 (1995), which applies *Griffin*). Under *Griffin*, any error in issuing a deliberate-ignorance instruction that lacks adequate evidentiary support is rendered harmless beyond a reasonable doubt if sufficient evidence supports a valid alternative theory of guilt. See 502 U.S. at 56-60; see also *Stone*, 9 F.3d at 937-942. Accordingly, given that petitioner's convictions "can be upheld under an actual knowledge theory," the court of appeals properly determined that petitioner did not suffer any prejudice as a result of the district court's issuance of both actual-knowledge and deliberate-ignorance instructions. Pet. App. 30a.

b. At least five circuits have held that instructing the jury on deliberate ignorance when there is insufficient factual support for the charge is harmless if the instruction is legally correct (*e.g.*, the instruction permits the jury to rely on deliberate ignorance only if the evidence shows such ignorance beyond a reasonable doubt, and it explains that deliberate ignorance requires more than negligence). See *United States* v. *Ayon Corrales*, 608 F.3d 654, 657-658 (10th Cir. 2010); *United States* v. *Leahy*, 445 F.3d 634, 654 n.15 (3d Cir.), cert. denied, 549 U.S. 1071 (2006); *Mari*, 47 F.3d at 786; *Adeniji*, 31 F.3d at 63- 64; *Stone*, 9 F.3d at 938.[2] Those

[2] The Tenth Circuit in *United States* v. *Francisco-Lopez*, 939 F.2d 1405, 1412-1413 (1991), concluded that the use of the particular instruction in that case was not harmless error because the evidence of actual knowledge was not so compelling that the jury would necessarily have convicted the defendant on that theory. See *United States* v. *Hilliard*, 31 F.3d 1509, 1517 (10th Cir. 1994) (applying *Francisco-Lopez*). More recently, though, the Tenth Circuit has reliably applied *Griffin* principles to find harmless error where the jury was instructed on a factually unsupported deliberate-ignorance theory, but the evidence was sufficient on an actual-knowledge theory. See *Ayon Corrales*, 608 F.3d at 657-658; *United States* v. *McConnel*, 464 F.3d 1152, 1159-1160 (2006),

courts reason, like the Sixth Circuit here and in accord with *Griffin*, that if the evidence is insufficient to support a theory of deliberate ignorance but is sufficient to support a finding of actual knowledge, then the jury "must not have convicted the defendant on the basis of deliberate ignorance" but rather "on the basis of [the defendant's] positive knowledge." *Mari*, 47 F.3d at 785 (emphasis omitted).

As petitioner notes (Pet. 20), some courts of appeals have addressed the application of harmless-error review to a deliberate-ignorance instruction slightly differently. The Eighth Circuit in *United States* v. *Barnhart*, 979 F.2d 647 (1992), concluded that instructing a jury on deliberate ignorance does not constitute harmless error if the evidence of actual knowledge, although sufficient to support the jury's finding, is not overwhelming. See *id.* at 652-653 & n.1; *United States* v. *Covington*, 133 F.3d 639, 644-645 (8th Cir. 1998) (following *Barnhart*, but finding the error in giving deliberate-ignorance instruction to be harmless where evidence of actual knowledge was overwhelming). The Ninth Circuit also reached that conclusion. See *United States* v. *Mapelli*, 971 F.2d 284, 287 (1992); *United States* v. *Sanchez-Robles*, 927 F.2d 1070, 1075-1076 (1991), disapproved on other grounds by *United States* v. *Heredia*, 483 F.3d 913 (2007) (en banc).[3] Those cases express a concern that,

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cert. denied, 549 U.S. 1361 (2007); *United States* v. *Hanzlicek*, 187 F.3d 1228, 1234-1236 (1999).

[3] Petitioner contends (Pet. 20) that the Fifth Circuit also "implicit-[ly]" takes that approach, pointing to *United States* v. *Ojebode*, 957 F.2d 1218 (1992), cert. denied, 507 U.S. 923 (1993). *Ojebode*, however, makes no mention of the harmless-error doctrine and does not reveal what harmless-error standard the Fifth Circuit employs in cases of this sort. The Fifth Circuit has since applied *Griffin* principles to conclude that

absent evidence to support a deliberate-ignorance instruction, juries may incorrectly employ a negligence or recklessness standard. See, *e.g.*, *Barnhart*, 979 F.2d at 652; *Mapelli*, 971 F.2d at 287.

For the reasons given above, the government disagrees with the standard used in cases like *Barnhart* and *Mapelli*. But review is unwarranted because the outlier circuits that have in the past failed to apply *Griffin*—the Eighth and Ninth Circuits—are reevaluating their cases, to the point that any division of authority that existed in the past may nearly be repaired. In *United States* v. *Hernandez-Mendoza*, 611 F.3d 418, 418-419 (2010), the Eighth Circuit retreated from its analysis in *Barnhart* and effectively overruled *Barnhart* because *Barnhart* failed to consider and apply *Griffin*. Similarly, the Ninth Circuit decisions purportedly in conflict with this case do not mention *Griffin*, and do not reject its application. And the Ninth Circuit in a more recent unpublished case has applied *Griffin* in evaluating the harmlessness of a deliberate-ignorance instruction unsupported by the evidence. *United States* v. *Daly*, 243 Fed. Appx. 302, 309, cert. denied, 552 U.S. 1070 (2007), and 552 U.S. 1211 (2008). In addition, the en banc Ninth Circuit has rejected the view that giving a deliberate-ignorance instruction "risks lessening the state of mind that a jury must find to something akin to recklessness or negligence," and has concluded that where (as here) the jury is instructed that it may not convict based on a finding that the defendant was merely careless, "[r]ecklessness or negligence never comes into play, and there is little reason to suspect that juries

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the issuance of a factually unsupported deliberate-ignorance instruction was harmless. See *United States* v. *Black*, No. 96-20423, 1997 WL 367451, at *4 (June 9, 1997) (unpublished but noted at 119 F 3d 1).

will import these concepts, as to which they are not instructed, into their deliberations." *Heredia*, 483 F.3d at 924. That en banc pronouncement so far undermines the reasoning of *Mapelli* and *Sanchez-Robles* that any nominal division of authority is illusory. At a minimum, it is reasonable to expect that in time the Ninth Circuit will, like the Eighth Circuit in *Hernandez-Mendoza*, recognize in a published opinion the application of *Griffin* to cases like this. At that point, there would clearly be no split for this Court to resolve.

c. Regardless, this case does not present a suitable vehicle for determining the proper approach to the harmless-error issue, for two reasons.

First, petitioner's claim is based on the premise that there was an insufficient factual basis for the deliberate-ignorance instruction. As discussed, the court of appeals properly found otherwise. Because this Court could affirm the judgment by affirming the court of appeals' fact-bound holding that there was no error at all, this is not an appropriate vehicle for reaching the harmless-error issue petitioner would present. Cf. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 104 (2007) (declining to reach harmlessness issue on which review was granted after finding no error).

Second, any error would be harmless even on the standard most favorable to petitioner. That most favorable standard asks whether the evidence at trial of actual knowledge was overwhelming. See, *e.g.*, *Covington*, 133 F.3d at 645 (finding the error in giving deliberate ignorance instruction to be harmless where evidence of guilt was overwhelming). That is the case here. As the court of appeals concluded, the circumstantial evidence clearly supported a finding by the jury of actual knowl-

edge. Pet. App. 35a-48a (detailing evidence demonstrating actual knowledge as to each count of conviction).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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